In The
SUPREME COURT OF THE UNITED STATES

FILED
JUN 3 1974
MICHAEL RODAK, JR., CLERK

OCTOBER TERM, 1973

NO. 73-1815

NORTHWAY COIN-CLEAN, INC., a corporation,
Petitioner

v.

BORG-WARNER CORPORATION

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT and APPENDIX

FRANK E. COHO
ROBERT G. MacALISTER
1410 Grant Building
Pittsburgh, Pa. 15219
Attorneys for Petitioners

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CONSTITUTION:

Fifth Amendment 3

Article III 3

STATUTES:

Judicial Code:
28 USC Sec. 132(a) 4
28 USC Sec. 43 (a) 4

28 U.S.C. Sec. 2403 MAY BE APPLICABLE TO THIS PROCEEDING AND, THEREFORE, COPIES OF THIS PETITION ARE BEING SERVED ON THE SOLICITOR GENERAL, DEPARTMENT OF JUSTICE, WASHINGTON, D.C. 20530, PURSUANT TO RULE 33 2.(b).

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1973

No._____

NORTHWAY COIN-CLEAN, INC., a corporation,
Petitioner

v.

BORG-WARNER CORPORATION

PETITION FOR WRIT OF CERTIORARI

Petitioner, NORTHWAY COIN-CLEAN, INC., a corporation, prays that a Writ of Certiorari issue to review the judgments of the United States Court of Appeals for the Third Circuit, dated January 3, 1974, refusing to grant a rehearing of its Judgment Order dated November 20, 1973.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Third Circuit, decided November 20, 1973 (Appendix A), is not reported. The Petitioner's petition for rehearing was denied on January 3, 1974 (Appendix B). The opinion of the United States District Court for the Middle District of Pennsylvania, filed January 11, 1973, is not reported (Appendix C). The Order of Mr. Justice Brennan extending the time to file Petition For Writ of Certiorari until June 3, 1974, is Appendix D. The Order of the District Court for the Western District of Pennsylvania dismissing without prejudice a prior suit on the same claim is Appendix E. That Court's refusal to vacate the dismissal without prejudice is Appendix F. Appendices E and F are parts of the record before the court below referred to in Footnote No. 1 of Appendix A. Appendix C is page 91a of the same transcript. Appendix E is at 38a and Appendix F at 75a thereof.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1). The judgment sought to be reviewed was entered by the United States District Court for the Middle District of Pennsylvania on January 11, 1973. (Appendix C). The judgment of the Court of Appeals for the Third Circuit, affirming the District Court judgment was entered November 20, 1973 (Appendix A). A Petition for Rehearing was denied on January 3, 1974 (Appendix B).

QUESTION PRESENTED FOR REVIEW

Whether petitioner, having had a complaint in a diversity action dismissed without prejudice in the United States District Court for the Western District of Pennsylvania, was deprived of liberty or property without due process of law, contrary to Amendment 5 of the United States Constitution, when it later filed a similar complaint in the United States District Court for the Middle District of Pennsylvania and the complaint was summarily dismissed by that court with prejudice because of the prior dismissal without prejudice.

CONSTITUTIONAL AND STATUTORY PROVISIONS APPLICABLE

AMENDMENT 5 TO UNITED STATES CONSTITUTION so far as relevant here:

"ARTICLE V

"No person shall ... be deprived of life, liberty, or property, without due process of law; ... "

ARTICLE III OF UNITED STATES CONSTITUTION so far as relevant here:

"ARTICLE III

"Section 1. The judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. .... "

Act of June 25, 1948, c. 646, 62 Stat. 869, as Amended, 28 U.S.C. Sec. 1 et seq., relating to the creation and composition of district courts and Courts of Appeals:

28 U.S.C., Section 132(a):

"(a) There shall be in each judicial district a district court which shall be a court of record known as the United States District Court for the district."

28 U.S.C., Section 43(a):

"(a) There shall be in each circuit a court of appeals, which shall be a court of record, known as the United States Court of Appeals for the circuit."

STATEMENT OF THE CASE

This action was filed in the District Court for the Middle District of Pennsylvania on June 7, 1972. The complaint filed in the United States District Court for the Middle District of Pennsylvania is at pages 2a through 5a of the Transcript following Appendix F. In the complaint, your Petitioner, in Paragraph IX, stated that it learned of the deceit of the defendant for the first time on or about June 10, 1966, less than six years prior to the filing of the action in the Middle District. The statute of limitation in matters of deceit in Pennsylvania is six years. The prior action in the Western District of Pennsylvania, at No. 66-865, proceeded to the point of a pretrial conference, at which point Petitioner found itself without sufficient evidence to proceed to trial. Since that time, Petitioner has discovered evidence not available then that Petitioner believes would enable it to prove its case. Because of inability to proceed to trial on October 1, 1969, the District Court for the Western District of Pennsylvania entered an order dismissing the action "without prejudice." (Appendix E)

Plaintiff moved to have the dismissal order vacated, but on October 1, 1969, the District Court for the Western District of Pennsylvania denied the motion to vacate and left the order of dismissal in effect "without prejudice." (Appendix F) No hearing on the merits of this case has ever been held by either District Court or any other Court.

REASONS FOR GRANTING THE WRIT

Petitioner has been denied the opportunity to be heard on the merits of its cause of action. Petitioner has been denied a determination of its cause of action in accordance with the due process assured by the United States Constitution.

A reading of the cases collected in the 52-some volume publication known as "Words and Phrases" under "Due Process of Law", pages 194 and 195, shows that the Supreme Court of the United States has repeatedly stated that the due process clause applies to legal proceedings as such, as well as actions taken by other branches of the government. Saunders v. Shaw, 244 U.S. 317, 37 S.Ct. 638 (1917).

Likewise, in the same publication under "Without Prejudice", it will be found that cases have universally held that the dismissal of an action without prejudice does not affect the cause of action and allows a new action to be brought on the same cause of action.

In the present situation, the action was originally brought in Allegheny County, Pennsylvania because this is where the Petitioner was located and service of process could be obtained on the defendant in Allegheny County. Later, as Petitioner prepared for trial, it discovered that there were a number of similar cases pending in the United States District Court for the Middle

District of Pennsylvania, and that the evidence necessary to prove the case was more readily available in the Middle District than in the Western District of Pennsylvania. It was for that reason that when the Petitioner reached the point at which it felt it would be possible to prove its case, the renewal action was brought in the Middle District rather than in the Western District of Pennsylvania.

The District Court for the Middle District of Pennsylvania dismissed on the ground that the dismissal without prejudice should be treated as a final dismissal. The Circuit Court of Appeals for the Third Circuit affirmed on this basis and also stated that the matter was beyond the statute of limitations, although the complaint itself shows that it is within the period of the statute of limitations. Invocation of a statute of limitations is a matter of pleading rather than dismissal on a preliminary motion under any circumstances.

It is clear that both Federal courts and State courts must obey the due process requirements of the United States Constitution. For the Federal courts those requirements are in the Fifth Amendment. For the State courts those requirements are in the Fourteenth Amendment.

The Supreme Court of the United States has repeatedly emphasized the meaning of due process, pointing out that whether the Fifth Amendment or the Fourteenth

Amendment is applicable, "an opportunity to be heard must be granted at a meaningful time and in a meaningful manner." Fuentes v. Shevin, 407 U.S. 67, 80, 92 S.Ct. 1983, 1994 (1972).

Similar declarations will be found in following recent decisions of the Supreme Court of the United States: Benton v. Maryland, 395 U.S. 784, 793-794, 89 S.Ct. 2056, 2062 (1969); Bloom v. Illinois, 391 U.S. 194, 195, 88 S.Ct. 1477, 1478 (1968); Boddie v. Connecticut, 401 U.S. 271, 378-379, 91 S.Ct. 780, 786 (1971).

It is therefore respectfully submitted that this is a situation deserving consideration of granting a petition of certiorari to determine whether a summary dismissal of a diversity action because of a prior dismissal of a similar complaint without prejudice deprived petitioner of liberty and property without due process of law, contrary to Amendment 5 to the United States Constitution.

CONCLUSION

The Petition for a Writ of Certiorari should be granted for the reasons set out above.

Respectfully submitted,

Frank E. Coho

FRANK E. COHO
ROBERT G. MacALISTER

Attorneys for
Plaintiff-Petitioner
1410 Grant Building
Pittsburgh, Pa. 15219
(412) 471-6963

APPENDIX A

In The
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 73-1227

NORTHWAY COIN-CLEAN, INC., a corporation,
Appellant

v.

BORG-WARNER CORPORATION

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE MIDDLE DISTRICT OF
PENNSYLVANIA

Submitted under 3rd Cir. Rule 12(6)
July 27, 1973 Before VAN DUSEN and
WEIS, Circuit Judges

Resubmitted under 3rd Cir. Rule 12(6)
August 15, 1973 Before VAN DUSEN,
ROSENN and WEIS, Circuit Judges

Robert G. MacAlister, Esq.,
Frank E. Coho, Esq., and
Gilbert E. Morcroft, Esq.,
Pittsburgh, Pa.
Christian V. Graf, Esq.,
Harrisburg, Pa.,
Attorneys for Appellant

Clayton A. Sweeney, Esq. and
Thomas L. VanKirk, Esq., of
Buchanan, Ingersoll, Rodewald,
Kyle & Buerger,
Pittsburgh, Pa.,
Attorneys for Appellee

JUDGMENT ORDER

After consideration of the contentions of plaintiff-appellant, the briefs of counsel, and the record,[1]

It is ORDERED AND ADJUDGED that the January 11, 1973, district court order, entering judgment in favor of defendant, is affirmed and costs are taxed against appellant.

BY THE COURT:-

/s/ Van Dusen
Circuit Judge

Dated: Nov. 20, 1973

1. For example, see the transcript of the proceedings before the district court (W.D. Pa., Civil No. 66-865) on September 8, 1970 (51a-74a). Also it is noted that no appeal was taken from the September 8, 1970 final order of the United States District Court for the Western District of Pennsylvania in Northway Coin-Clean, Inc. v. Borg-Warner Corporation. Civil No. 66-865 (75a).

APPENDIX B

In The
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 73-1227

NORTHWAY COIN-CLEAN, INC., a corporation,
Appellant

v.

BORG-WARNER CORPORATION

SUR PETITION FOR REHEARING

Present: SEITZ, Chief Judge, and
VAN DUSEN, ALDISERT, ADAMS,
GIBBONS, ROSENN, HUNTER,
WEIS and GARTH, Circuit
Judges.

The petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ Van Dusen

APPENDIX D

SUPREME COURT OF THE UNITED STATES

No. A-920

NORTHWAY COIN-CLEAN, INC.,

Petitioner

v.

BORG WARNER CORPORATION

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petioner(s).

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including June 3, 1974.

/s/ William J. Brennan, Jr.
Associate Justice of the Supreme Court of the United States

Dated this 1st
day of April, 1974

14-16

PARTS OF TRANSCRIPT

referred to in

Opinion of lower court,

APPENDIX A, Note 1,

pages 1a thru 5a;
32a thru 38a;
44a-45a;
50a thru 75a; 91a

June 7, 1972, 1—COMPLAINT—filed at Harrisburg, Pa. and demand for trial by jury.

June 7, 1972, 2—SUMMONS—Issued and together with copies of Complaint handed to U. S. Marshal for service.

June 7, 1972, J. S. 5

July 21, 1972, SUMMONS—returned served 7/6/72, together with copy of Complaint. (MF&E $9.24)

July 24, 1972, 3—MOTION—of Defendant to Dismiss, and

July 24, 1972, MOTION—of Defendant for Summary Judgment.

Oct. 6, 1972, 4—NOTICE—of Clerk to counsel of record listing Defendant's Motion to dismiss and Motion for Summary Judgment for October 20, 1972 at 2:00 P. M. at Harrisburg, Pa.

Oct. 12, 1972, 5—AFFIDAVIT—of Clayton A. Sweeney, Esquire, Counsel for the defendant, Borg-Warner Corp.

Oct. 12, 1972, 6—BRIEF—in support of defendant's motion to dismiss and motion for summary judgment.

Oct. 12, 1972, 7—CERTIFICATE—of service of Thomas L. Van Kirk.

Oct. 18, 1972, 8—PLAINTIFF'S BRIEF—*contra* motion to dismiss and defendant's motion for summary judgment, and

CERTIFICATE—of service thereof.

Oct. 18, 1972, 9—AFFIDAVITS—of Erle M. Heath and Robert G. Mac Alister

Oct. 20, 1972, 10—MINUTE SHEET—of Clerk, *re* argument on defendant's motion to dismiss or for summary judgment.

Oct. 20, 1972, Argued and taken under advisement. (H)

Jan. 11, 1973, 11—ORDER—*Re* Defendant's Motion to Dismiss and Motion for Summary Judgment. Motion of defendant is granted because action is granted because the action is barred by the statute of limitations and because the action has already been dismissed with finalty of Civ. Action No. 66-865 by the U. S. Dist. Ct. for the Western Dist. of Penna.

Summary judgment is accordingly entered in favor of the defendant and against the plaintiff. (H).

Jan. 11, 1973, J. S. 6 Copy to counsel, from Hbg. office.

Feb. 5, 1973, 12—NOTICE OF APPEAL—of Plaintiff from final judgment dismissing plaintiff's complaint and entering summary judgment for defendant on Jan. 11, 1973.

Copy to counsel of record and to U. S. Court of Appeals for Third Circuit.

Feb. 5, 1973, 13—STATEMENT—that certified check in amount of $250.00 is deposited with Court to secure payment of costs if appeal is finally dismissed or judgment affirmed.

Mar. 2, 1973 RECORD ON APPEAL—mailed to U. S. Court of Appeals for Third Circuit.

Mar. 8, 1973, 14—RECEIPT--for record on appeal.

Complaint.

(Filed June 7, 1972.)

1 Plaintiff, Northway Coin-Clean, Inc., herein called Northway, is a corporation organized and existing under the

laws of the Commonwealth of Pennsylvania with principal place of business at 2423 Saw Mill Run Boulevard, City of Pittsburgh, County of Allegheny and Commonwealth of Pennsylvania.

II Defendant, Borg-Warner Corporation, herein called Borg-Warner, is a corporation organized and existing under the laws of the State of Illinois with principal place of business in the City of Chicago therein. Defendant maintains a branch office in York, Pennsylvania, within the Middle District of Pennsylvania.

The matter in controversy exceeds, exclusive of costs and interest, the sum of Ten Thousand ($10,000.00) Dollars.

III On or about August 1, 1962, Northway entered into a business known as "Northway Cleaning Village", located 7715 McKnight Road, McCandless Township, Allegheny County, Pennsylvania, for the purpose of providing to the public certain self service coin operated laundry and dry cleaning facilities.

IV During the year 1962 and thereafter Borg-Warner undertook to sell and deliver to purchasers thereof certain newly developed commercial coin operated dry cleaning machines and similar equipment through a division of Borg-Warner known as Norge.

V At all relevant times, Borg-Warner did through its own servants, agents and employees, sell and deliver in Pennsylvania commercial coin operated dry cleaning machinery and similar equipment through its aforesaid Norge division.

VI On or about August 1, 1962, defendant Borg-Warner, through its servants, agents and employees, who at said time were acting on said defendant's behalf within the scope of

their authority and upon defendant's business contacted plaintiff and urged plaintiff to invest in a "Norge Village" dry cleaning concept developed by defendant, which concept required utilization of the aforesaid Norge division machinery and equipment to be purchased by plaintiff.

VII At said time defendant, through and by its aforesaid servants, agents and employees, represented to plaintiff that purchase by plaintiff of the Norge equipment recommended and the establishment by plaintiff of a cleaning village utilizing same could and would lead to unusual and substantial profits for plaintiff because:

(a) the total per load operating cost using Norge equipment was substantially lower than that using competitive machinery;

(b) full time attention to management of such village by plaintiff would not be required in that no more than 10 to 20 hours per week personal supervision or management was required for such operation.

VIII In reliance upon such representations and assurances by defendant, acting by and through its aforesaid servants, agents and employees, plaintiff, on or about August 1, 1962, purchased from Borg-Warner, defendant, and took delivery of, all that certain Norge coin operated automatic laundry and dry cleaning equipment which defendant advised plaintiff was necessary to provide the basic equipment needed for the operation by Northway of an integrated and coin operated plant pursuant to the Norge concept.

IX On or about June 10, 1966, plaintiff learned for the first time that defendant's representations and assertions to it relating to its purchasing of said Norge equipment and its operation of a Norge village were false, fictitious and fraudulent in that:

(a) the total per load cost of operating Norge equipment was then and there grossly and deliberately understated by defendant, its servants, agents and employees aforesaid, and the falsity of such cost statement was well known to defendant at the time;

(b) the management time requirement statements were totally false;

(c) besides the falsity of such statements of which it was aware as aforesaid, defendant further knew that it did not at the time have in its possession adequate facts upon which to base a belief or any statement as to actual and true total per load cost;

(d) in defendant's eagerness and anxiety to secure a top position in the newly developing coin operated dry cleaning machinery market, defendant deliberately and fraudulently misrepresented said machinery and equipment and the uses thereof to plaintiff although defendant knew or had every reason to know that the representations so made by it to plaintiff were false and fraudulent.

X As the direct and proximate result of the aforesaid fraudulent practices and statements of defendant, plaintiff was thereafter forced to dispose of its aforesaid business, "Northway Cleaning Village", suffering great financial loss in the process thereof.

WHEREFORE, plaintiff demands judgment against defendant in the sum of Two Hundred Thousand ($200,000.00) Dollars, together with interest and costs.

FRANK E. COHO,
Attorney for Plaintiff.

Exhibit "G" Attached to Defendant's Motion.

Exhibit "G".

In the
DISTRICT COURT OF THE UNITED STATES
For the Western District of Pennsylvania

NORTHWAY COIN-CLEAN, INC.,
a corporation,

Plaintiff.

v.

BORG-WARNER CORPORATION,
a corporation,

Defendant.

Civil Action No. 66-865.

MOTION TO DISMISS.

NOW COMES the defendant, Borg-Warner Corporation, by its attorneys, Buchanan, Ingersoll, Rodewald, Kyle & Buerger, and moves the Court, pursuant to Rule 41 b. of the Federal Rules of Civil Procedure, to dismiss with prejudice the within action, and as grounds therefor avers the following:

1. This action was filed on July 19, 1966.

2. Thereafter, the parties carried on discovery by means of depositions and interrogatories.

3. Since this lengthy discovery period disclosed that it was virtually impossible to determine the basis of the plain-

tiff's alleged cause of action, the attorneys for both parties conferred with the Court on November 7, 1968, in an attempt to establish a special pretrial procedure which would compel the plaintiff to state the basis of its cause of action and allow the defendant a brief period of discovery based on the plaintiff's statement.

4. The plaintiff's attorneys drafted such an order, to which the attorneys for both parties consented.

5. On November 18, 1968, the Court signed the order as prepared by the attorneys for the plaintiff, which order required the following:

a. Plaintiff to complete all of its discovery within 60 days of the order [that is, by January 17, 1969];

b. Plaintiff to file within 70 days of the order [that is, by January 27, 1969] a narrative written statement of facts and law, including citations;

c. Defendant to complete all its discovery within 130 days of the order [that is, by March 28, 1969];

d. Defendant to file within 140 days of the order [that is, by April 7, 1969] a narrative written statement of facts and law, including citations;

e. Attorneys for the parties to meet within 150 days of the order [that is, by April 17, 1969] and to make a pretrial stipulation, to mark exhibits and to explore settlement possibilities;

f. Extensions of time to be granted only upon timely motion;

g. The Court to notify the parties thereafter of the scheduling of a pretrial conference.

Exhibit "G" Attached to Defendant's Motion.

6. On or about November 18, 1968, the Court notified the attorneys for the parties that motions for further extensions of time would not be viewed with favor by the Court because of the lengthy period of time during which this action had already been carried on the Court's docket.

7. The attorneys for the plaintiff engaged in no discovery pursuant to the November 18 order until December 30, 1968, on which date the plaintiff's attorneys mailed to the defendant's attorneys a lengthy set of interrogatories.

8. On January 13, 1969, the fact having become plain to the attorneys for the defendant that they could not obtain from the defendant the material necessary to make timely response to the interrogatories, the attorneys for the defendant requested and were granted an extension of time so to respond of 10 days, that is, to January 23, 1969.

9. On January 23, 1969, the defendant answered all but two of the plaintiff's interrogatories, to which two it filed objections.

10. By an order dated January 24, 1969, this Court directed the parties to file briefs and set a date for argument. This order made no provision for staying the November 18, 1968 consent order and, to the best of defendant's attorneys' knowledge, no such stay was requested.

11. On February 14, 1969, having received briefs from the parties and having that day heard argument on the defendant's objections to interrogatories, this Court ordered that those objections be sustained. No stay of the November 18 order was requested at that argument and none was granted.

12. After the said argument, an attorney for the defendant questioned an attorney for the plaintiff regarding the filing of the narrative written statement required of the plaintiff by the November 18 order and regarding discovery

procedure which the defendant desired after such filing. The defendant's attorney agreed to refrain from calling the plaintiff's delinquency to the Court's attention if the plaintiff's attorneys would file their statement and facilitate the defendant's discovery within a short time after that discussion.

13. What followed were more than six weeks of silence from the plaintiff's attorneys which virtually circumvented and destroyed the intention and the efficacy of the November 18, 1968 order.

14. Because the plaintiff's failure to file its narrative written statement was depriving the defendant of its right to discovery as provided in the order of November 18, the attorneys for the defendant, on April 1, 1969, demanded that the plaintiff's attorneys immediately file their narrative written statement.

15. The plaintiff answered this demand by filing, on April 4, 1969, a motion to transfer this action to the Middle District of Pennsylvania. The motion to transfer clearly contemplated that this action of the plaintiff would be turned over to other attorneys and consolidated with other actions.

16. On April 7, 1969, the defendant filed a Motion to Dismiss, the first fifteen paragraphs of which are republished hereinabove.

17. Argument on the said Motion to Dismiss and on the plaintiff's Motion to Transfer was held on April 16, 1969.

18. By its Order dated April 16, 1969, this Court, after argument, denied the plaintiff's Motion to Transfer.

19. In a separate order dated April 16, 1969, this Court found that the plaintiff had failed to file a pretrial narrative statement as and when required by this Court's Order of November 18, 1969, that the plaintiff had been unable to

secure certain documents, that the defendant's attorneys would make these documents available at Harrisburg, and that the plaintiff's attorneys would require five months to copy and organize these documents. This Court then made the following Order:

> NOW, THEREFORE, it is ordered that the defendant's Motion to Dismiss be and the same hereby is denied, and
>
> IT IS FURTHER ORDERED that plaintiff may continue its discovery and shall file its narrative written statement in accordance with the order of November 18, 1968 on or before September 16, 1969, and the timetable established by the said order of court shall be then construed as if September 16, 1969 were 70 days from the date of the said order; ***PROVIDED THAT if the plaintiff shall fail to file its narrative statement as provided for herein, then upon proper motion, the action shall be dismissed with prejudice,*** and
>
> IT IS FURTHER ORDERED that the pretrial conference in this action, scheduled for May 20, 1969, be and the same hereby is continued. [Emphasis supplied.]

20. On the day following the argument and Orders discussed in the three paragraphs immediately above, the defendant's attorneys confirmed the availability of the documents discussed in paragraph 19 hereof by a letter to the plaintiff's attorneys, a copy of which is attached hereto labelled Exhibit "A" and made a part hereof.

21. As represented in Exhibit "A", the said documents have been available from April 17, 1969 to the present. The plaintiff's attorneys have never during that period approached the defendant's attorneys, either in Pittsburgh or in Harrisburg, for the purpose of examining or copying the said documents or for any other purpose. The defendant can

conclude only that representations made by the plaintiff's attorneys at argument on April 16, 1969 were intended to delay the adjudication of this action.

22. At the time of filing this Motion—fully two weeks after the deadline set by this Court in its Order of April 16, 1969 denying the defendant's first Motion to Dismiss—the plaintiff has filed *no* Pretrial Narrative Statement and has made *no* attempt to contact the attorneys for the defendant. It appears to the attorneys for the defendant that the attorneys for the plaintiff have not even begun the task which they represented on April 16, 1969 would require five months to complete.

23. The plaintiff has ignored two orders of this Court, namely that of November 18, 1968 and that of April 16, 1969, and has failed to act in accordance with its representations made to this Court on April 16, 1969.

WHEREFORE, the defendant moves this Court, pursuant to Rule 41 b. of the Federal Rules of Civil Procedure, to dismiss with prejudice the within action because of the plaintiff's failure to file a narrative written statement on or before January 27, 1969 as required by this Court's order of November 18, 1968, and because of the plaintiff's failure to file a narrative written statement on or before September 16, 1969 as required by this Court's order of April 16, 1969. The defendant moves the Court to implement the *proviso* contained in its Order of April 16, 1969.

Respectfully submitted,

/s/ JAMES D. MORTON,
/s/ ALAN BRUCE BOWDEN,
Buchanan, Ingersoll, Rodewald,
Kyle & Buerger,
Attorneys for the Defendant.

38a

Exhibit "H" Attached to Defendant's Motion.

APPENDIX E

Exhibit "H".

In the
DISTRICT COURT OF THE UNITED STATES
For the Western District of Pennsylvania

NORTHWAY COIN-CLEAN, INC.,
a corporation,
Plaintiff,

v.

BORG-WARNER CORPORATION,
a corporation,
Defendant.

Civil Action No. 66-865.

ORDER.

AND NOW, to wit, this 1st day of October, 1969, upon consideration of the within Motion to Dismiss, it is hereby ORDERED, ADJUDGED AND DECREED that the above-captioned action be and the same hereby is dismissed without prejudice.

RABE F. MARSH,
United States District Judge.

Exhibit "J" Attached to Defendant's Motion.

Exhibit "J".

In the
DISTRICT COURT OF THE UNITED STATES
For the Western District of Pennsylvania

NORTHWAY COIN-CLEAN, INC., a corporation,
Plaintiff.

v.

BORG-WARNER CORPORATION, a corporation,
Defendant.

Civil Action No. 66-865

MOTION TO VACATE ORDER.

Plaintiff, Northway Coin-Clean, Inc., moves the Court to vacate and set aside its Order of Dismissal Without Prejudice in the above-entitled Action, entered on October 1, 1969, and allow the above action to proceed to trial, on the grounds that plaintiff's failure to prosecute this action prior to said order was inadvertent and unintentional, that plaintiff has now located necessary witnesses not heretofore known or available to plaintiff in this case, and that the increase of known claims against the same defendant involving similar questions of fact and law in the Middle District of Pennsylvania since October 1, 1969 indicates this is a proper case for consideration by the Judicial Panel on Multidistrict

Exhibit "J" Attached to Defendant's Motion.

Litigation, as appears more fully from the affidavit of Robert G. MacAlister, Esquire, attached hereto.

June 25, 1970.

ROBERT G. MacALISTER,
Robert G. MacAlister,
FRANK E. COHO,
Frank E. Coho,
ALAN R. ASH,
Alan R. Ash,
Attorneys for Plaintiff,
1410 Grant Building,
Pittsburgh, Pa. 15219,
471-6963.

Exhibit "K" Attached to Defendant's Motion.

Exhibit "K".

In the
UNITED STATES DISTRICT COURT
For the Western District of Pennsylvania

NORTHWAY COIN-CLEAN, INC., a corporation,
Plaintiff,

vs.

THE BORG-WARNER CORPORATION,
Defendant.

Civil Action No. 66-865.

TRANSCRIPT OF PROCEEDINGS.

Pretrial Conference held at Pittsburgh, Pennsylvania, Tuesday, September 8, 1970, before: Honorable Herbert P. Sorg.

Appearances:

For the Plaintiff: Robert G. MacAlister, Esq., 3320 Grant Building, Pittsburgh, Pennsylvania. 15219

For the Defendant: Clayton A. Sweeney, Esq., Buchanan, Ingersoll, Rodewald, Kyle and Buerger, 1800 Oliver Building, Pittsburgh, Pennsylvania. 15222

Marion C. Wike, Official Reporter.

Exhibit "K" Attached to Defendant's Motion.

[2] PROCEEDINGS.

The Court: Good afternoon. This is Northway Coin against Borg-Warner, Motion to vacate order of June 26th, 1970.

I dismissed this action without prejudice on October 1, 1969, having allowed about eight postponements for the Plaintiff to get ready.

Why should I restore it?

Mr. MacAlister: If Your Honor please, for one simple and basic reason:

The Court: Tell me what rule you are under first.

Mr. MacAlister: I am under 60, and also 1407, transfer to the multi-district panel.

The Court: That was in effect October 1, 1969.

Mr. MacAlister: You are right, sir, and I didn't know about it.

The Court: I can't help that. Ignorance of the law is no excuse.

Mr. MacAlister: I know that, Your Honor. I am sure it is not. I don't think every lawyer is supposed to know all the law. At least, I don't.

The Court: No lawyer, and no judge, knows [3] all the law.

Mr. MacAlister: I didn't know the existence of the rule at that time, or I would have followed it.

The Court: Why did I dismiss it without prejudice? I told you I was going to dismiss it with prejudice.

Mr. MacAlister: I, at that time, thought you did it to give us a chance to do something about it.

The Court: So you can bring another suit?

Mr. MacAlister: We can not, because the statute has long run against us.

The Court: That is why I think I did it.

Mr. MacAlister: I think you are more than fair, under some of the circumstances, you know, to dismiss it without prejudice, and I interpreted that you must have felt there was some reason and some legitimacy and some basic right in the case which we had.

Now, my position is simply this: This case is relatively simple, but we have to carry the burden of proof on two, really three, bases of facts.

First, this being a fraud and deceipt case, we have to be able to go to the Jury and be able to give evidence to the Jury as to who prepared the financial statements wherein Borg-Warner represented the profitability of these franchises that my client bought from them. Now, I can't [4] do that, your Honor, unless I know who prepared the financial statements. I can't do it, Your Honor, unless I get a chance to see the records upon which they were prepared, and I have never been able to get that information.

I think Mr. Sweeney should answer that. Why has Borg-Warner fought me getting that information? If I had that information, and if I was able to review it, I could readily determine whether or not the financial statements were honest, whether they were dishonest, who prepared them, and on what basis.

If I found out they were honestly prepared, and if I found out they did represent the facts at that time, I would walk away from this lawsuit so fast that I would actually file my own order, asking a dismissal.

But I have never had a chance to find that out yet, and that is basic to any fraud and deceipt.

Secondly, I have not been able to find out who determined the process and equipment which Borg-Warner sold my client were satisfactory and suitable for a profitable, self-operated business. They have never given me the opportunity to find out. They refuse to tell me who the employees were who worked on it, and where the reports are, and where the records are. Again, if I could find that out, —I don't want to be in Court fighting lawsuits I can't win, but why not let Mr. Sweeney answer that? Why have they re- [5] fused to make that information available? It seems to me if they are going to win lawsuits denying discovery and keeping us from getting information, is this justice?

As I see it, you had a legitimate position in this last argument. I wasn't here, but you said, "Why have you not filed a narrative statement?"

I will tell you why we have not done it, because we couldn't file an honest one, a complete one and full one, without that basic information. That is the whole case, and I am not in the habit of filing any narrative statement unless I expect to be held to that when I come to court, and I was not able to do that, because I didn't have the two basic bits of information.

I know certain things. I know my client lost $200,000. I know the people who sold them went bankrupt in less than a year, because everybody lost money. I know publicly in

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Exhibit "K" Attached to Defendant's Motion.

Time Magazine they admitted, Borg-Warner, that the deal didn't work the way it was supposed to. I know those things, but I don't know the true foundation of the lawsuit; first, who prepared the financial statements, were they false or true. I don't know who made the determination as to whether or not the equipment was suitable for the use they sold it.

Then, again, I have not been able to get any information as to who put out that glowing advertisement that all the investor had to do was put his money in the deal and [6] he was taken care of.

Again, I say if I had those three bits of information and I was able to see for my own eyes these people weren't guilty of fraud and deceit, because it appeared from everything else they did that they were, and I say to you in conclusion, there is one other—incidentally, my related counsel, counsel in related cases that are down in the Middle District, are in pretrial today with Judge Sheridan, and that is why they are not here to appear with us and answer your questions which were legitimate: Are those cases consolidated down there? We don't know. I think we will know after today.

The Court: Well, they have not been consolidated up to this day?

Mr. MacAlister: No, but I think we will know after this pretrial meeting.

Seriously, my case is really simple. Why won't Borg-Warner make available for us the evidence that would prove those financial statements were honest, and why won't they make available the proof that the process was suitable and satisfactory for the operation, when, in fact, we know that last part from our own observation, that it wasn't.

We don't know anything about the financial statements, except when we got into the business we found out what they said represented profitability just wasn't possible under [7] the operation. Again, I would like Mr. Sweeney to answer that.

In closing, your Honor may well believe from what the record shows to date that somehow or other we have been sitting on our hands and not doing any work in this case. I checked my own records this morning in my own office on the amount of time we put into this case already. In my office—and this doesn't include Mr. Shearer, who keeps his own records, we have spent 427 hours in this case since we first got it. Out of my own pocket I have advanced $1,800-plus in out-of-pocket expenses, so we have been trying to get the information. We have been trying, and I seriously believe it would be a great miscarriage of justice if because of technical arguments which are quite well done by Mr. Sweeney—he has cited the rules—he has cited them well. But one thing he has not emphasized is what a harsh application of them would do, and that is that it would take away from us an opportunity to lose our own lawsuit in a Courtroom, and this we should have. This we should do.

Here we are alleging fraud and deceipt, and fraud and deceipt is not done under Kaufmann's clock at high noon. It is done in secret. We should have the opportunity to see that evidence.

If the Court please, if you would give us that opportunity and instruct the defendant they must furnish us [8] that evidence, and not say, "We don't know where the records are. We don't know where the witnesses are."

Then I think we can dispose of this case honestly and quickly. That is the only thing I would like to have, and that

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is all I want. If I am asking for too much, I just can't understand why, because all I want here is justice.

I also further think that when you read their deposition saying they don't know where the records are, and they sold them to a corporation called Fedders, and that we can get the records from Fedders, what right? We have no contract with Fedders, even if they did sell the records. It makes it difficult for me to believe, and I think your Honor might find it difficult to believe, that this Borg-Warner keeps the responsibility of defending these suits and sold the records, so they don't have any records to defend it on.

These are practical things I am talking about. I know if I had a corporation I represented and they were being sued, I wouldn't have sold my records, and I would know who the witnesses were that I needed to defend the cases. It just doesn't make any sense to me, none whatsoever.

The Court: You say you have located necessary witnesses not heretofore known or available to the Plaintiff? Who?

Mr. MacAlister: These are the ones in the Middle District case.

[9] The Court: Who are they?

Mr. MacAlister: There are scads of them.

The Court: Name them.

Mr. MacAlister: I don't have the list, but there are many of them. When Mr. Shuman was here the last time at the arguments, he—I forget how many thousands of records he has compiled with the names of witnesses, the evidence, and where he—he found them all the way from Texas to Delaware. They have spent a tremendous amount of time on this case, and a tremendous amount of effort.

The Court: You have access to them, don't you?

Mr. MacAlister: Only in the Middle District. How can I get them here?

The Court: Copy them.

Mr. MacAlister: I can copy the records, but I am thinking of the witnesses.

The Court: Four thousand records, you say?

Mr. MacAlister: Yes.

The Court: Copy them and bring them up.

Mr. MacAlister: Without the witnesses, they are not much good. They are pieces of paper.

The Court: There are ways of getting witnesses, depositions, subpoenas.

Mr. MacAlister: We have tried the deposition [10] route, and we have failed pretty well, because, as I have said to your Honor, Borg-Warner has very effectively kept us from getting any information, and yet these people have been able to get it, and they got it before we got into the picture.

Every time Borg-Warner found out somebody knew about this case, then the next Plaintiff is shut out.

The Court: The co-counsel in the Middle District has the names of those witnesses?

Mr. MacAlister: Yes, but the case has to be tried there. It must be tried there. It must be consolidated. Why take up the time of this Court to go through a case that can take a month or six weeks to try? Why shouldn't it go to the Middle District?

The Court: Because you brought it here.

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Exhibit "K" Attached to Defendant's Motion.

Mr. MacAlister: We should have brought it there. Had we known there was cases there, it sure would have brought there.

In our Interrogatories, we asked if there were other cases, and this Court saw fit to say "You have no right to know that."

The Court: Oh, no. I said you do have a right to know, but you could find it out just as easily as the person you asked.

Mr. MacAlister: Maybe I misunderstood.

[11] The Court: Why make these people go around to the records of the United States, when you could do the same thing?

Mr. MacAlister: I could have. Admitted. I could have, but why were they afraid to answer that question? Why didn't they want us to know? If that Interrogatory comes across my desk, as corporate counsel, I wouldn't hesitate to answer that at all. I really can't understand why they were afraid to admit that. For fear we might find out something about the case? For fear we might win the case? For fear we might get some evidence? These are the things that bother me. I wouldn't have hesitated to tell them. I would have thought this my duty, as a member of the Court.

The Court: Well, you found out, anyway.

Mr. MacAlister: How did I find out? Let me tell you. One rainy night in New York City, I, about 5:30 in the evening, I am walking down Lexington Avenue, and I remember where I had read that there is a trade magazine which deals with the cleaning and dying industry. I stop in a phone booth and I looked up the name of this magazine, and

I happened to be within a block of it. I went up into the—to see if there was anybody in the office, and there was. The editor was there. And I introduced myself, and I told him what I wanted to know. I said, "What have you written in your trade magazine about these franchise deals so I could [12] get some practical background?"

He said, "Who do you represent?"

I told him I represented Northway, out of Pittsburgh. I asked him, because I couldn't find out from Mr. Sweeney. I asked him, "Do you know of any other cases?"

He said, "Oh, sure."

I said, "Where are they?"

He told me, and he gave me the name of a man to call, who, incidentally, when I called him, was so afraid to talk for fear he would get himself in trouble—he finally did. He told me that there were cases right in the Middle District. This man happened to live in Harrisburg. That is how I found out. That was the first time.

Up until that time, the—I had no knowledge of it, and, the fact of the matter—in the Philadelphia case, which is also under this 1407 Petition, in there, Borg-Warner, in their Interrogatories, say, state clearly there are no other cases. The one in the Eastern District, which is also attemping to get up in the Middle District through the use of 1407—now, if this is not misrepresentation, if this is not bald, outright lies, I would like to know what it is. They knew that. They had to. Those Interrogatories were signed by Mr. Houchins, who is the house counsel for Borg-Warner, and who stood there the days we took the depositions, and we were told the deposition—the one we did take, they [13] didn't know where the records were, and they didn't know who the em-

ployees were. They didn't know this. They didn't know that. They had no information about this. And here we are in this Court today, and I believe we have been put on, to say the least. I wouldn't want to think that the Court would also be put on like we have been.

The Court: There has been many a potential lawsuit lost because they couldn't get the witnesses.

Mr. MacAlister: You are right. But everybody has a right to get into a courtroom. Why can't we lose it there? Why isn't that fair?

The Court: Because you won't comply with the pretrial order.

Mr. MacAlister: We couldn't. We would have, but we couldn't. These people kept up from getting the evidence.

The Court: I say it frequently happens you can not prove your case, and then you have no case.

Mr. MacAlister: I would like to see the evidence on which I couldn't prove it.

The Court: It seems to me I gave you a lot of time.

Mr. MacAlister: You did, and I know your fairness in doing that, but sometimes a lot of time is not enough, particularly when, here we are, we are little Goliaths— [14] rather, little David, fighting big Goliath. We can not even get a pebble to throw at Goliath. We are held out from getting the basic information which we need for our lawsuit by evasions, by statements, by conduct and all the other things.

Now, I think justice—and that is the only important thing I think we should be interested in; not technicalities, not time or anything else—we ought to be interested in deter-

mining whether or not these people did fraudulently and deceiptfully do what they did, which we say they did. How can anybody be injured here by this Court opening up this judgment and permitting us to try through 1407 to get it over to the Middle District? How can justice be hurt by doing that? Maybe the Panel will say, "Look you are too late," or any number of reasons, and throw us out, and then we will be dead. But I think we should have that chance.

The Court: You say the statute of limitations has run?

Mr. MacAlister: Yes, Your Honor.

The Court: When did it run?

Mr. MacAlister: Quite some time ago.

The Court: When?

Mr. MacAlister: Well, it was long before. It ran shortly after we started the lawsuit, because it took us [15] the best part of three or four years to realize what had been done to use.

The Court: When did it start?

Mr. MacAlister: I think it started at a date when we entered into the agreement.

The Court: When was that?

Mr. MacAlister: This is so many years back now, I would be guessing. I think it was sometime around '62 that—We filed in July, 1966, and it was a four-year statute, so it was sometime in 1962 of '63.

The Court: It was a four-year statute?

Mr. MacAlister: I don't know. Maybe it was six years. But I know it was shortly before the statute was run that we filed it.

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Exhibit "K" Attached to Defendant's Motion.

Also, Your Honor might like to know how it actually dawned upon stupid me that this could have well happened to us, this fraud and deceipt.

I was corporate counsel for the company called Carmen Pittsburgh Company. Their business is here in Pittsburgh, and their business is selling supplies to cleaning and dying and laundry companies. As such, I had to go to the directors' meeting, and when I was there it became increasingly clear, as the months weny by, all these little coin-clean operators weren't able to pay their bills for their supplies, so I began to wonder why is this? Then the people started [16] to come to see me. I sent for them to talk about—to talk to them about—why didn't they pay their bills. They told me what happened after they entered into these franchises, how they weren't profitable; they couldn't be profitable.

My client happens to be a very successful—the client, the principal owner of my client's business happens to be a lawyer who was able to afford to pay his commitment for this equipment. Most of the people couldn't do that. Most of them had to close up. Many of them lost all their savings, and there was more than one company in this business.

I think you would be hard put today, with the exception of a few operations in this country, to find out they are even existing today, because they weren't profitable. They were mis-stated. They were sold under misrepresentation.

This is how I began to find out about the situation. I blamed the situation on my client and myself of maybe poor businessmen, but we never had a chance. We never had a chance. And why didn't we have a chance? It appears as how the business could never have been operated profitably in such a way to have done to get out of the deal. This is how I found out about it. That is why I was a long time bringing

the lawsuit. It took a while, stupid as I am, believing what big corporations say, and thinking they tell the truth, because this is my background. I have been as- [17] sociated in business all my life, and generally they tell the truth, but this time I think they put us on.

I still think the only fair thing for Your Honor to do is to give us a chance in a courtroom with—after giving us an opportunity to again confront Borg-Warner and say, "Let us see those records on which you prepared those financial records. Let us see the record itself. Let us talk to the people who did it."

If they are honest, I guarantee you—and I promise you I will file my own Motion to Dismiss.

The Court: It is not as simple as you state.

Under the Rule 16 that you say you are under, I don't think I can grant your Motion. You don't fit any one of them.

Mr. MacAlister: But Mr. Sweeney says, "Oh, yes, I do. Only one."

The Court: Which one is that?

Mr. MacAlister: That is the only one I want. I agree on the other ones, I don't. He says this on page 22 of his brief. The only Rule 60-B reason which could conceivably cover this ground is the sixth clause, "Any other reason justifying release of judgment."

He says Rule 60-B is a residual clause to cover these few extraordinary circumstances which do not come within [18] the preceding five clauses.

But the overriding justice rules are only to make it possible for the litigation to take place. They are not to be

the substance of my argument, Your Honor. The substance is we have been kept from getting the basic information we have to have to find out whether or not we should lose or win a case in a courtroom, and if we had that opportunity—and it is that simple. It is not complicated.

The Court: Mr. MacAlister, I should have been told that last fall.

Mr. MacAlister: You should have been. I am sorry. I wasn't here, or maybe I would have said that.

Mr. MacAlister: I was not here in person at the arguments, but this has been my deep feeling in this case from the beginning. I am in the embarrassing position of a lawyer who represented the people that went into this deal, and it is a pretty serious thing when based upon representations which I believe also—you may be sure I find that my clients have lost all this money, and is generally true in the whole business of these coin-operated laundries.

The Court: It seems last fall—and my recollection may be faulty—but you had the lawyer for the cases in the Middle District, and he was right here, and you said you needed five months to get the records of the Defendant in the Middle District, and they were sent to Pittsburgh, [19] and you never looked at them.

You had access to the 4,000 exhibits that the Plaintiff had. You had access to the names of the witnesses the Plaintiff had, and you were not able to file your pretrial narrative statement.

Mr. MacAlister: If your Honor please, it came to me as a tremendous surprise when I read Mr. Sweeney's brief and arguments that these records were in Pittsburgh. We never were told that.

The Court: Whether you were or not, they were available to you in Harrisburg.

Mr. MacAlister: They were available in Harrisburg, and counsel in the related cases said, "You are wasting your time. There is nothing relevant in there. Don't spend your time and money."

The Court: You asked me for five months to do it.

Mr. MacAlister: Admittedly, and you fairly granted it to me, but when we found out it was a red herring—

The Court: You never looked at them.

Mr. MacAlister: Counsel in the related cases did.

The Court: Well, you had his records and witnesses.

[20] Mr. MacAlister: They are only good in the Middle District. I couldn't see how I can bring those records there, and bring them into this District.

The Court: I can't argue with you.

Mr. MacAlister: If I understand you to say that if I brought those copies of those records down here I could use them in this courtroom, —

The Court: Copies of records time and again are offered in evidence in this courtroom. It is very rarely I get an original anymore.

Mr. MacAlister: Again, why is it too late for me to do it now? How is anybody injured?

The Court: We will have to hear Mr. Sweeney on that.

Mr. MacAlister: Except me?

The Court: If nobody is injured, he ought to agree.

Mr. MacAlister: Thank you, your Honor.

The Court: Who is injured, Mr. Sweeney?

Mr. Sweeney: If your Honor please, I am Clayton Sweeney, and I believe at the monent nobody is injured, but if your Honor reconsiders his order dated, correctly, October 1, 1969, I believe my client would be injured, and I believe my client would be injured for a very good reason.

[21] We have filed with your Honor affidavits addressing ourselves, as best we were able, to what we believed Mr. MacAlister's position would be when we got here.

The Court: I must compliment you on your very thorough brief.

Mr. Sweeney: With your Honor's permission, I would like to pass it on to Mr. Thompson. He was the one who prepared the brief.

The Court: It was very thorough and diligent.

Mr. Sweeney: I would like to accept it, but I am not entitled, so I must pass it on to him.

The Court: If you get into more litigation, Mr. Thompson, it is a very good brief.

Mr. Thompson: Thank you, your Honor.

Mr. Sweeney: I think my client would be injured for a number of reasons, and Mr. MacAlister repeats a series of allegations and accusations I suppose against me, my law firm, and my client, for not permitting them to do a lot of vague things which I can not, frankly, identify.

We filed affidavits by Mr. Houchins, by Mr. Schisler, who was the attorney in three unconsolidated actions in

Harrisburg, and Mr. Bowden in our office, in which we attempted to set forth what had taken place here.

We made available the witnesses who were in our [22] power to make available, and if memory serves me correctly, produced all who were sought. Mr. MacAlister is frank in admitting at the moment he has no cause of action, and I can't help that.

But I submit to your Honor that last October we had a right to come back and ask you to make that dismissal with prejudice, because you had earlier indicated you would.

The Court: I can't recall why I didn't.

Mr. Sweeney: I can't answer that. We filed the motion some weeks after the default had taken place, and after five months had been granted. I was not snapping a judgment. You will recall on April 18, 1969, Mr. MacAlister's co-counsel frankly admitted they were in default then.

The Court: And I lost patience in April, and he persuaded me to give him another five months, and he had the lawyer from Harrisburg who said he would cooperate with him, and the Defendant said he would open up his records to him, and I was overcome and I gave him five months.

I don't know why I did it without prejudice.

Mr. Sweeney: In that connection, I would like to state on April 17, the day after you were overcome, our firm wrote a letter making available in Pittsburgh or Harrisburg all these documents. We kept them in Harrisburg, if memory serves me correctly, a couple months. We had them [23] available, and then we brought them to Pittsburgh. I did not go through them on behalf of Mr. MacAlister.

At the end of that period, Mr. Bowden—I at that time was engaged in another case—and Mr. Bowden called and said,

"Gentlemen, your time has run, and perhaps we ought to clear the default."

Nothing. A couple weeks went by, and we decided, if I recall, we made another call, and we didn't hang on a technical dissent. This time went on, and nothing happened, and so we filed it and requested in that that it be with prejudice.

The Court: Do you know when the statute of limitations would have run?

Mr. Sweeney: Your Honor, I pleaded in the Answer to the original Complaint that the statute of limitations had already run, and I am convinced it had run before the filing of the Complaint in 1966, the transaction having taken place in 1962.

If it was a fraud, Mr. MacAlister admits it was when he discovered it way back then. The exact date, I can't pinpoint.

The Court: Why would it be only four years?

Mr. Sweeney: I think that is the four years provided under the Uniform Commercial Code.

[24] The Court: Is that your idea?

Mr. Sweeney: That is one of the bases, but their Complaint does not state on what basis it was filed.

Your Honor may remember the somewhat unusual pretrial order when I urged your Honor to permit them to complete their discovery before we went forward with ours, because we couldn't identify what their cause of action was.

As I recall, Mr. Shearer drafted this, and we went over and submitted it to your Honor.

Apparently, Mr. MacAlister does not know to this day. I submit we have answered everything we had to answer. I will not waste your Honor's time justifying my client.

The Court: The reason I was searching for answers on the statute of limitations is because heretofore when I entered in default without prejudice it is to give them a chance to bring another suit within the statute of limitations. I can't understand why I did it without prejudice here.

Mr. Sweeney: I assumed at the time you entered the order that was the reason, and I thought, to be honest with you, perhaps there was a six-year statute. They could allege they didn't become aware of the fraud until a subsequent date. I thought there would be a factual allegation and your Honor thought "I will put this out and let them go."

[25] Then there arrived a Motion to Transfer before the Multi-District Panel. You can not transfer—I am mixing this up in my language.

The Multi-District Panel can not transfer something that does not exist. They are doing nothing. I would add, the Motion to Transfer was made before you. You denied the transfer. I don't believe the circumstances have changed. I don't have the names of any witnesses. The situs is here in Western Pennsylvania. The Plaintiff is here, and we went through Mr. Bowden's argument outlining where all the people are. There is nobody in the Middle District, with the possible exception of one witness, and we could depose him, if we need it.

Now we come to the Motion under 1407, which was enacted almost two years before your Honor ruled last October.

As I recall, the enactment date was April, 1968.

The Court: That is right. April 29.

Mr. Sweeney: So that I submit, your Honor, it could not be an after-discovered effect, and, furthermore, there is a mistake on our brief on page 8 in a date at the top of the page.

Your Honor, we pointed out beginning on page 7, "There has been no change in this litigation, and no increase in claims since September 5, 1969."

With your Honor's permission, I would like to [26] orally correct that to 1965. There has been no increase in the plaintiffs. There has been no consolidation.

You recall on April 16 you pointed out they could move to consolidate before the summer. Why this switch in the Middle District? I represent a client against whom suit was filed. We were not technical or harsh, with our adversary. Nothing has happened. Nothing new has been added that would require, in the interests of justice, you do it, and, as we indicate, respectfully, in our brief, I don't think your Honor can do it. I think that is legitimate.

The Court: As much as I would like to give them another chance, I don't think I can.

Mr. Sweeney: I don't think the law permits it. I think, quite frankly, they have had every chance.

This is not a case of somebody snapping a judgment, and the discovery was extended seven or eight times.

The Court: Eight times. I counted.

Mr. Sweeney: We did object to an Interrogatory, but from what Mr. MacAlister says, I find out that didn't matter.

I will add one thing. The Pennsylvania cases pending in Harrisburg are being argued before Judge Sheridan. There

has been a severance motion filed. I am not one to suggest that you can predict what any Judge will do, but in- [27] dications are Judge Sheridan is not going to consolidate them.

Mr. MacAlister has indicated the background is completely different. The 4,000 documents that were the big thing, suddenly only relate to that case. Why would we transfer it to the Middle District anyway?

The Court: I can't think of the detail, but I was convinced it would have been an imposition on the Middle District for me to transfer this case down there. The reason for it, I don't know now, but I would have resented it if they had transferred theirs up here.

Mr. Sweeney: I think the reasons are simple, if I can jog your memory, the business was operated out of the Western District and it was and is still in operation in the Western District by a man who, according to the records, operated it at a profit ever since 1964. The Plaintiff is a resident of the Western District, and the sales people involved are here in the Western District. The only people who would be inconvenienced were our people, and all the documents were here in the Western District. There was no reason to transfer it.

And I submit they are articulated before your Honor in the April, 1969, hearing. There is a transcript of that hearing.

The Court: I know. I was hoping I would get the time to read it today, but I didn't.

[28] Mr. Sweeney: I think the reasons are in there. I won't, unless your Honor has questions to ask me, extend the argument.

Exhibit "K" Attached to Defendant's Motion.

I think with all deference to Mr. MacAlister, the equities are with us. They had their day in court, and they are frank to admit today they are unable to prove a claim. I think the end of the line is here. It has to be so.

The Court: I think the end of the line is here.

Mr. MacAlister: If your Honor please, again, notwithstanding your determination that the end of the line is here, I must again say that this case is being lost by client because he never was able to get the information under which he could have won the case by the actions of Borg-Warner.

Unfortunately, I have not been able to convince your Honor of that. But I am sure in my own mind and heart that this is what happened to us.

The Court: Well, Mr. MacAlister,—

Mr. MacAlister: I think it is quite a tragedy that we are now—our case is all over with your statement, "The end of the line is here." It is all over, and I shouldn't be making any more speeches, but I just have to.

The Court: Go right ahead.

[29] Mr. MacAlister: I just have to, because we have been put on, and I am afraid your Honor has been, too.

I stood up before your Honor representing a man in a criminal tax case, and he was lying to you in the sentencing here, a man by the name of Bachman.

The Court: Bachman?

Mr. MacAlister: Yes. But you had the card in your hand. You had the probation officer's report with the truth in it, and he told your Honor that he was going to the doctor so

many times, and you looked down at him and said, "Stop putting me on."

I think if your Honor had that same kind of information in front of him today from an independent third source, you could look down and, not say to Mr. Sweeney, because I am not accusing him of any of this, but I think you could look down at him and say, "Your client is putting me on."

Can you believe, your Honor, that they don't know who made those financial statements? Can you believe that they don't know whether or not that was suitable for a use? Can you believe what you are doing here? Can you believe they sold those records and they couldn't get them?

These are so simple and so direct and so real.

The Court: All I can see, Mr. MacAlister, for a period of years, and over eight continuances, I gave you [30] the opportunity to get it.

Mr. MacAlister: You did. And, remember, I say fraud is not commited under Kaufmann's cl ck. It is very difficult to prove.

When you get into a case like this, you have got difficulties. You carry a tremendous burden. But, still, if I had those three things, as I said today, if they are telling the truth, they will hear nothing more from me, but I doubt that they are. I think through technicalities and through skills which I don't have, they have been able to keep me from getting the truth, and if—Who is afraid of the truth— Who is afraid of the truth? The man who is not telling it.

If they weren't afraid of the truth, they would say, "MacAlister, come here and look at these things and see for yourself."

Exhibit "K" Attached to Defendant's Motion.

The Court: They told you they sold the records to Fedders Company. Did you go to Fedders?

Mr. MacAlister: No, I have no right. All they need to say to me is, "Why are you coming here? These records belong to us."

I have no right to look at their records.

The Court: Why do you say that?

Mr. MacAlister: Because it makes common sense to me.

[31] The Court: I can't argue with you.

Mr. MacAlister: I don't want your Honor to argue with me. I would hope before you write your order you will consider those three simple, basic arguments of mine, which go right to the argument of the whole case, and Mr. Sweeney could, if he would, he could stand up and say, "What do we have to lose? Let MacAlister look at those and shut him up once and forever."

The Court: If Mr. MacAlister and Mr. Shearer, who is an excellent lawyer, couldn't get those things you have wanted since 1966, you are not going to get them now.

I hate to impose on you, gentlemen, but if you will now write the proper order, I will sign it.

Mr. Sweeney: Yes, your Honor.

(Court was adjourned.)

I HEREBY CERTIFY the foregoing to be a true and correct transcript of the testimony had in the matter of Civil Action 66-865, September 8, 1970.

MARION C. WIKE,
Official Reporter.

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Exhibit "L" Attached to Defendant's Motion.

Exhibit "L". APPENDIX F

In the

DISTRICT COURT OF THE UNITED STATES

For the Western District of Pennsylvania

NORTHWAY COIN-CLEAN, INC.,
a corporation,

Plaintiff,

v.

BORG-WARNER CORPORATION,
a corporation,

Defendant.

Civil Action No. 66-865.

ORDER OF COURT.

AND NOW, to-wit, this 8th day of September, 1970, after hearing and upon due consideration of Plaintiff's Motion to Vacate Order of Dismissal Without Prejudice entered on October 1, 1969, IT IS ORDERED that said Motion be and the same hereby is denied.

s/ RABE F. MARSH,
United States District Judge.

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APPENDIX C

Order.

(Filed January 11, 1973.)

AND NOW, this 11th day of January 1973, Defendant's Motion to Dismiss and Motion for Summary Judgment having come on for hearing, and the court having duly considered the said motions with accompanying exhibits and affidavits, and having duly considered the *contra* affidavits of the plaintiff; and after consideration of the briefs and arguments of both parties and being fully advised, the motion of the defendant is granted because the action is barred by the statute of limitations and because the action has already been dismissed with finality at Civil Action No. 66-865 by the United States District Court for the Western District of Pennsylvania.

Summary judgment is accordingly entered in favor of the defendant and against the plaintiff.

R. DIXON HERMAN,
United States District Judge,
Middle District of Pennsylvania.

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MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 1815

NORTHWAY COIN-CLEAN, INC.
Petitioner,

v.

BORG-WARNER CORPORATION,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

CLAYTON A. SWEENEY
THOMAS L. VANKIRK
BUCHANAN, INGERSOLL, RODEWALD, KYLE & BUERGER
Attorneys for Respondent
1800 Oliver Building
Pittsburgh, Pennsylvania 15222

SMITH BROS., LAW PRINTERS, 620 SECOND AVENUE, PITTSBURGH, PA. 15219

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

COUNTER-STATEMENT OF QUESTION PRESENTED FOR REVIEW

Has a petitioner been deprived of property without due process of law when a United States District Court granted Summary Judgment against it on the duel grounds that its cause of action was barred by the applicable Statute of Limitations and its cause of action had previously been dismissed with finality by another United States District Court?

COUNTER-STATEMENT OF CASE

The petition seeks a review of a judgment order entered by the United States Court of Appeals for the Third Circuit on November 20, 1973. The judgment order affirmed an order entered on January 11, 1973 by Judge R. Dixon Herman of the United States District Court for the Middle District of Pennsylvania granting respondent's Motion for Summary Judgment at Civil Action No. 72-301 (App. 10-11). The United States Court of Appeals for the Third Circuit denied rehearing on January 3, 1974 (App. 12).

The action for which review is sought was brought by petitioner, Northway Coin-Clean, against respondent, Borg-Warner Corporation (App. 18-21). Although this was the first time that the action had been brought in the Middle District of Pennsylvania, the United States District Court for the Western District of Pennsylvania had previously had an opportunity to adjudicate the identical claim at Civil Action No. 66-865 (hereinafter referred to as "the Western District action"). A detailed account of the Western District action must be presented since petitioner's claim, in its Petition for Writ of Certiorari, is that it was denied due process of law by reason of the United States Court of Appeals for the Third Circuit's affirmance of the District Court's holding that "... the action has already been dismissed with finality at Civil Action No. 66-865 by the United States District Court for the Western District of Pennsylvania" (App. 57).

On or about August 1, 1962 petitioner purchased from a distributor certain Norge coin-operated laundry and dry cleaning equipment manufactured by respondent

and opened its business known as Northway Cleaning Village (App. 19). On July 19, 1966, petitioner filed its Complaint initiating the Western District action (App. 22). That Complaint alleged that respondent had breached its warranties and made fraudulent misrepresentations to the petitioner in connection with the sale to petitioner of the aforementioned coin-operated dry cleaning equipment.*

For the two years following the filing of the Complaint, discovery was undertaken by both petitioner and respondent by means of depositions and interrogatories (App. 22). Because this lengthy discovery period disclosed that it was impossible to determine the basis of petitioner's alleged cause of action, attorneys for both parties conferred with the Court on November 7, 1968 in order to establish a pretrial procedure which would compel petitioner to state the basis for its cause of action and allow respondent a brief period of discovery thereafter (App. 23). On November 18, 1968, the Court filed an order (which was prepared by attorneys for petitioner) providing, *inter alia,* that petitioner complete its discovery within 60 days and file a narrative written statement of the facts within 70 days from November 18, 1968 (App. 23).

Petitioner still did not file its pretrial narrative statement when required, and, on April 1, 1969, respondent's attorneys requested that petitioner file said statement (App. 25). Rather than file a pretrial narrative statement, petitioner filed, on April 4, 1969, a Motion to

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*This fact was appropriately documented in the United States Court of Appeals for the Third Circuit but cannot be documented from the appendix attached to petitioner's Petition for Writ of Certiorari.

Transfer requesting that the action be removed to the Middle District of Pennsylvania (App. 25). Respondent then filed, on April 7, 1969, a Motion to Dismiss under Rule 41(b) of the Federal Rules of Civil Procedure (App. 25). Following argument on these two motions, the Court, on April 16, 1969, ordered (1) that petitioner's Motion to Transfer be denied; and, (2) that respondent's Motion to Dismiss be denied but if petitioner failed to file its narrative statement by September 16, 1969 the Court, upon proper notice, would dismiss the action with prejudice (App. 25-26).

When petitioner had still not complied with the deadline, respondent, two weeks after the expiration of said deadline, filed on September 30, 1969 a Motion to Dismiss *with prejudice* (App. 22-27). On October 1, 1969 the Court ordered the Western District action dismissed *"without prejudice"* (App. 28).

Respondent heard nothing more about the Western District action until June 24, 1970 at which time petitioner filed a Motion for Transfer of Proceedings under Section 1407 of the Judicial Code with the Judicial Panel on Multidistrict Litigation.* Since no action was pending, the Panel took no action on the Motion. Two days later petitioner filed a Motion to Vacate Order which requested that the Court set aside the order of October 1, 1969 which dismissed the action *without prejudice* (App. 29).

On September 8, 1970 Judge Rabe B. Marsh, who presided over all of the proceedings in the Western Dis-

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*This fact was appropriately documented in the United States Court of Appeals for the Third Circuit but cannot be documented from the appendix attached to petitioner's Petition for Writ of Certiorari.

trict action, held a hearing on petitioner's Motion to Vacate (App. 31). At this hearing, it was admitted by counsel for petitioner that the case was based on a cause of action for fraud and deceit, and that, at the time of the argument, the period prescribed by the statute of limitations had expired (App. 33). Following argument Judge Marsh denied petitioner's Motion to Vacate by an order dated September 8, 1970 (App. 56). No appeal was ever taken from this order in spite of the fact that Judge Marsh made it clear that the dismissal was *with prejudice* (App. 53).

On June 7, 1972, almost ten years after the petitioner purchased the equipment and eight years after its business was sold, petitioner filed this lawsuit in the Middle District of Pennsylvania (App. 18). The Complaint set forth the same cause of action which was alleged in the Complaint filed in the Western District action filed on July 19, 1966.

On July 24, 1972 respondent filed a Motion to Dismiss and a Motion for Summary Judgment pursuant to Rules 12(b)(6), 41(b) and 56 of the Federal Rules of Civil Procedure.* These motions were based on the facts that (1) the period prescribed by the Statute of Limitations had expired; (2) the ruling of Judge Marsh was final and barred the Middle District action by virtue of the doctrine of *res judicata;* and (3) the United States District Court for the Middle District of Pennsylvania could not overrule the United States District Court for the Western District of Pennsylvania, a court of con-

*This fact was appropriately documented in the United States Court of Appeals for the Third Circuit but cannot be documented from the appendix attached to petitioner's Petition for Writ of Certiorari.

current jurisdiction.* Judge R. Dixon Herman, who presided over the Middle District action, granted respondent Summary Judgment on two grounds: (1) because the action was barred by the Statute of Limitations and, (2) because the action had already been dismissed with finality at Civil Action No. 66-865 by the United States District Court for the Western District of Pennsylvania (App. 57). The United States Court of Appeals for the Third Circuit affirmed Judge Herman's order and later denied rehearing (App. 10-12). Petitioner now seeks a Writ of Certiorari solely on the ground that it was denied due process because the United States Court of Appeals for the Third Circuit treated the dismissal of the Western District action as a dismissal *with prejudice.*

ARGUMENT OF RESPONDENT

There are no special or important reasons for granting petitioner's petition for writ of certiorari.

Respondent cannot argue with the proposition set forth in petitioner's Petition for Writ of Certiorari that the Supreme Court of the United States should rectify the situation when a person is denied due process of law. Petitioner, however, has not been denied due process.

Petitioner has overlooked the fact that the United States District Court for the Middle District of Pennsylvania granted respondent's Motion for Summary

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*This fact was appropriately documented in the United States Court of Appeals for the Third Circuit but cannot be documented from the appendix attached to petitioner's Petition for Writ of Certiorari.

Judgment on the following two grounds and the United States Court of Appeals for the Third Circuit affirmed the decision on both grounds: (1) the action had been dismissed with finality in the United States District Court for the Western District of Pennsylvania and, (2) the applicable Statute of Limitations barred petitioner's action. Thus, even assuming that petitioner is correct in its contention that both courts erred in determining that petitioner's cause of action had been dismissed with finality, the United States District Court for the Middle District of Pennsylvania still properly granted respondent Summary Judgment because petitioner's claim is barred by the Statute of Limitations. The defense of the Statute of Limitations was properly raised in a Motion for Summary Judgment filed prior to the time of the Answer and the United States District Court for the Middle District of Pennsylvania properly granted Summary Judgment when it found that petitioner's claim was barred by the Statute of Limitations. *Hartmann v. Time, Inc.* 166 F.2d 127 (3d Cir. 1947), *cert. denied,* 334 U.S. 838 (1948).

Moreover, the claim of error raised in petitioner's Petition for Writ of Certiorari does not merit consideration by this Court. The United States Court of Appeals for the Third Circuit did not hold that a dismissal *without prejudice* is a final dismissal thus invoking the doctrine of *res judicata.* Rather the United States Court of Appeals for the Third Circuit decided that, based on the unique facts of this case, petitioner's cause of action had been dismissed with finality and could not be raised again because of the doctrine of *res judicata.*

While it is true that the initial dismissal of the Western District action was "*without prejudice*" the

Court's subsequent order and the transcript of the hearing on the Motion to Vacate leads to the inescapable conclusion that the refusal to grant the Motion to Vacate effected a dismissal *with prejudice*. At the hearing Judge Marsh acknowledged that he had dismissed this action *without prejudice* although he indicated that he did not understand why he had dismissed it *without prejudice* (App. 32). It is clear from the record that during the course of the hearing on the Motion to Vacate, Judge Marsh knew that the only avenue open to petitioner to bring its action at that time was through a reopening of the proceedings in the Western District. Petitioner's counsel told the Court that the period prescribed by the Statute of Limitations had expired. Thus, when Judge Marsh denied the Motion to Vacate, he knew that the litigation was permanently barred. Petitioner's counsel made it abundantly clear to Judge Marsh that no further litigation could be brought anywhere. The dismissal of the Motion to Vacate effectively turned Judge Marsh's 41(b) dismissal into a dismissal *with prejudice*.

Petitioner's Motion to Vacate in the Western District action was based upon Rule 60(b) of the Federal Rules of Civil Procedure. The denial of that motion was a final, appealable order. *Hines v. Seaboard Air Line Railroad Co.*, 341 F.2d 229 (2d Cir. 1965). When the petitioner, after learning that Judge Marsh's dismissal was intended to be *with prejudice*, did not appeal from Judge Marsh's order denying its Motion to Vacate, the judgment became final and was a bar to any future action. Petitioner does not deny that the same issues were raised in the Western District action as were raised in the instant action. Thus, the United States Court of Appeals for the Third Circuit correctly affirmed the order of

the United States District Court for Middle District of Pennsylvania which granted respondent's Motion for Summary Judgment based on the doctrine of *res judicata.*

The United States Court of Appeals for the Third Circuit did not render any decision which is in conflict with the decision of another Court of Appeals on the same matter; it did not decide an important state or territorial question in a way that conflicts with applicable state or territorial law; it did not decide an important question of federal law which has not been previously settled by the Supreme Court of the United States; it did not decide a federal question that conflicts in any way with applicable decisions of the United States Supreme Court; and it did not depart from accepted and usual procedures such as would call for the exercise of the United States Supreme Court's power of supervision.

For the above reasons this Court must deny petitioner's Petition for Writ of Certiorari.

CONCLUSION

Petitioner's Petition for Writ of Certiorari does not raise any questions which call for a determination by the Supreme Court of the United States. Therefore, this Court must deny petitioner's Petition for Writ of Certiorari.

Respectively submitted,

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BUCHANAN, INGERSOLL, RODEWALD,
KYLE & BUERGER
1800 Oliver Building
Pittsburgh, Pennsylvania 15222
Attorneys for Respondent.